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No. 208

In the

Supreme Court of the United States

F. O. WILEMON, *et al.*,
Petitioners,

v.

CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF F. O. WILEMON AND A. E. WILEMON

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CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF F. O. WILEMON AND A. E. WILEMON, TO REVIEW A JUDGMENT OF THE COURT OF CIVIL APPEALS IN THE 8th SUPREME JUDICIAL DISTRICT OF TEXAS, AND DENIAL OF WRIT OF ERROR BY SUPREME COURT OF TEXAS, AND ORDER OVERRULING MOTION FOR REHEARING.

PETITIONERS' MOTION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

I.

Judgments Sought to be Reviewed

Jurisdiction of this Honorable Court is sought to review: (1) a judgment of the Court of Civil Appeals for

the 8th Supreme Judicial District of Texas, El Paso, Texas, rendered December 16, 1953 *(Wilemon, et al. v. City & County of Dallas Levee Improvement District, et al., 264 S. W. 2d 543)*, adverse to Petitioners herein (Defendants in the trial court); (2) an order by said Court of Civil Appeals overruling Petitioners' Motion for Rehearing dated January 6, 1954; (3) denial by the Supreme Court of Texas March 24, 1954 of Petitioners' Application for Writ of Error; and (4) order of Supreme Court of Texas, dated May 12, 1954, overruling Petitioners' Motion for Rehearing.

II.

Time for Filing

The time for filing this application was fixed by an order of the Court of Civil Appeals at El Paso, dated May 14, 1954, on motion duly made by Petitioners, by which order stay of execution under the judgment was effectuated to July 12, 1954.

III.

Grounds Showing Jurisdiction in Supreme Court of the United States

The Constitutional provisions claimed by Petitioners to have been violated by the actions of the Courts below are:

(a) Amendment 5 of the Constitution of the United States which recites in part:

> "* * * nor shall private property be taken for public use without just compensation * * *."

(b) Amendment 14, Section 1 of the Constitution of the United States which recites in part:

> "* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *."

(c) Amendment VII of the Constitution of the United States which recites in part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *."

IV.

Statement of the Case

This is a suit in Trespass to Try Title for an acre of land, more or less, alleged to lie in the river bed of the old Trinity River Channel in Dallas County, Texas, and for a mandatory injunction requiring Defendants to remove improvements and fill placed on said land, and for an injunction to prevent Defendants from placing other improvements on said land. Plaintiffs filed their motion for summary judgment with supporting affidavits, and Defendants answered said motion with supporting affidavits and answered further with a formal "Not Guilty" plea and with affirmative allegations that the land in controversy was not in said river bed, but belonged to the Defendants in fee simple and had accreted to the Defendants and was a part of the adjoining land which admittedly belonged to the Defendants, and claiming damages for im-

provements placed on said land in good faith, in the alternative.

The court below entered an order on July 30, 1952, sustaining the motion for summary judgment as to all questions except the boundary line between the disputed property and that admittedly owned by Defendants, to which action of the court Defendants duly excepted.

Upon trial on the merits before a jury, the court took the case from the jury and entered its judgment on December 19, 1952, in favor of Plaintiffs, decreeing title in fee simple to said land in the State of Texas (who was not a party), use and possession in Plaintiffs, and issuing a mandatory injunction requiring Defendants to remove all improvements and fill placed on said land by them, and enjoining Defendants from further improving said land. The decisions of the trial were timely appealed to the Court of Civil Appeals at El Paso, Texas, which court affirmed the judgment below. Writ of Error in the Supreme Court of Texas was timely filed, which motion was denied. Motion for Rehearing was timely filed in the Supreme Court of Texas, which motion was denied on May 12, 1954.

V.

Manner in Which Constitutional Questions Arose

The above violations of Constitutional law arose as follows:

Petitioners had acquired by deed, title to their land, which was described by metes and bounds, two boundaries

of which extended to the bank of the Trinity River. The Respondents (Plaintiffs below) sought to show that they (Respondents) had superior title to a part of the land of Petitioners because of their (Respondents) conception of where the bank of the river was located. Respondents made their claim by virtue of their being a governing body of the State of Texas, not by having at any time condemned the land by condemnation procedure set out in the statutes of the state, and not by having paid compensation therefor to Petitioners and/or Petitioners' ancestors in title, as required under the "due process of law" doctrine, but by an engineer's map dated in 1926 upon which a line alleged to be the "river bank" was drawn, and which line protruded across property occupied by Petitioners in the conduct of Petitioners' business operations, and where Petitioners had erected improvements over a period of years of the value of $37,000.00.

Petitioners sought in the litigation of the matter to show where the natural bank of the river should be, urging that the location of the bank was a jury question, since Petitioners had a deed "to the river bank" and the sovereign state owned the land "between the river banks," Petitioners urging further that the line between the two parcels of land has never been established by any process of law or adjudication of a court of competent jurisdiction, and that the lower courts' refusal to (a) submit the question to a jury, and (b) their awarding the land to the State of Texas (not a party to the suit) without requiring proof that title had been acquired by due process of law,

violated the Constitutional provisions set out hereinabove, a jury trial being a right under the due process of law, deprivation of which has injured Petitioners.

VI.

Now Violations Were Called to the Attention of the Lower Courts

The above transgressions of the Constitutional rights of Petitioners were called to the attention of the trial court at the trial, the Court of Civil Appeals in the appeal to that court and the Supreme Court of Texas, as follows:

1. In the Trial Court

(a) Petitioners' Deed (Statement of Facts, Page 128), quoted from the record as follows: (description of property deeded)

> "all that certain tract or parcel of land lying and being situated in the County of Dallas, State of Texas, and more particularly described as follows:
>
> "BEGINNING at a point in the Southeast line of Corinth Street at the center line of Industrial Boulevard extended; THENCE along said Southeast line of Corinth Street North 21 deg., 56 min., 30 sec. East a distance of 95.68 feet to the point of beginning of a curve to the right whose radius is 2768 feet; THENCE along said curve and street a distance of 88.22 feet to the most westerly corner of the following described tract or parcel of land for the point of beginning. Starting at said point of beginning and continuing thence along said curve on the Southeast line of Corinth Street a distance of 220.85 (Operator's note: a pencilled figure of 315.05 is here inserted)

feet to a corner, said corner being also the intersection of the Southeast line of Corinth Street with the old channel river meanders; THENCE South 38 deg., 30 min. East along said river meander a distance of 230.59 feet to an angle point in said river meander; THENCE South 55 deg., 36 min. East a distance of 41.11 feet along the river meanders to a corner; THENCE South 34 deg., 11 min., 30 sec. West a distance of 149.81 feet to a corner; THENCE North 55 deg., 48 min., 30 sec. West, parallel to the center line of Industrial Boulevard extended and 180 feet distant therefrom, a distance of 230 feet to the point of beginning and containing in all ONE acre of land.

"The above described tract or parcel of land being a part and out of the W. S. Beatty Survey, Abstract No. 57 * * *."

shows Petitioners had record title to Old Trinity River Meanders (see Petitioners' brief to Court of Civil Appeals, wherein is recited:

"Defendants' deed conveying the property immediately adjoining the disputed property which conveys to defendants to and with the Old Trinity River meanders.")

(b) Withdrawal of case from the jury, to which Petitioners excepted. (Transcript, pages 53-54 wherein is recited:

"THEREUPON came a jury of twelve good and lawful men who were duly impaneled and sworn the facts to try. The case proceeded to trial before the Court and jury, and one of said jurors being excused by the Court on agreement of counsel, and the case proceeded to trial by agreement of counsel, before the remaining eleven jurors duly impaneled and sworn. At

the close of all of the evidence, the Plaintiffs, CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT and DALLAS COUNTY FLOOD CONTROL DISTRICT, filed their motion requesting the Court to instruct the jury to return a verdict in their behalf and against the Defendants, and/or that the Court withdraw the case from the jury and render judgment for the Plaintiffs as prayed, and the Court after hearing said motion and the arguments thereon was of the opinion that there was no issue of fact to be submitted to the jury and that said motion should be sustained to the extent that this cause should be withdrawn from the jury and the jury discharged, and the jury was thereupon on the 6th day of November, A. D., 1952, discharged from further consideration of this cause;")

to which action of the Trial Court Petitioners excepted.

(c) Referring to Transcript, pages 29 and 41, wherein is recited by Petitioners' witness:

"There is a serious and great discrepancy in the field notes in said deed as compared with the Survey of said lands as set out in said Survey Plat in that the line running in the direction N. 38 deg., 28 min. 9 sec. W., is set out in said plat as 240.74', Whereas the same line in the aforementioned deed is set out to be 230.58'. That such an error or discrepancy would result in a large portion of said land marked in red being a part of the land conveyed in said deed to A. E. Wilemon. The said discrepancy could result in as much as a 50' error on the South Easterly edge of the property as set out in said plat. That such error as shown by said discrepancies is in favor of the plaintiff in this lawsuit and is to the detriment of the defendants. The bearings in said deed are different from those in said plat to the detriment of the defendants in this suit.")

(d) A jury question was raised by the testimony of Petitioners' witness at page 51 of Statement of Facts, as follows:

"Q. How did you determine that line that you have testified is the west line of 1926, how did you determine that that was the west line?

"A. By the age of the timber, by the elevations of the land on both sides of the river and by the fact that the base line that they call the meander line of the river itself showed that there were trees 70 and 80 years old extending out beyond this base line and which isn't 'poker' for trees to grow out in the river that age.

"Q. What about the discrepancies with reference to what they call the high bank, did you find anything wrong there?

"A. Well, it wasn't the high bank because there were trees of too great an age that lay out beyond the limits of their traverse which certainly never grew in the river.

"Q. Tell the jury what trees you have found that are too old to have been in the river, there are a number of trees that they call for as reference trees in their notes that are too old to have grown in the river?

"A. On the property that is in controversy, beyond the limits of what they term is the meander line of the west bank of the Trinity River, there is a 24-inch elm, a 24-inch pecan, a 20-inch pecan directly on this property that have a minimum age of 70 years that lay out in the river according to them some 20 or 30 feet.

"Q. Have you had any experience in determining age of trees in your practice of engineering and surveying?

"A. Well, I have had about as much as the average surveyor. We all think we know something about trees. That is the first thing we are supposed to know when we start surveying is the height of trees and the type of trees and the condition under which they grow, and so on.

"Q. Have you practiced that knowledge for a number of years?

"A. Yes, sir.

"Q. Will a pecan tree live under water?

"A. Not for any great period."

2. In the Court of Civil Appeals

(a) Meander lines have never been properly located. (See Petitioners' brief to Court of Civil Appeals, page 16, wherein is recited:

"The 1926 survey does not properly locate the meanders of the Old Trinity River,"

referring to Statement of Facts, pages 109-110, wherein is recited by Petitioners' witness:

"That is what I am saying, that the survey in 1926 is merely a base line from which to locate the meanders of the river and they did not go to the extreme of locating it. They used the base line as the meander when in fact it wasn't. The meanders of the river were away from the base line and they were not careful enough on this particular set of notes to tie it in. Now, the other set of notes, they did tie it in and have located the meanders of the river.")

(b) Taking of Petitioners' property and awarding same to the State of Texas, which was not a party to the suit, without due process of law. (See Petitioners' brief to Court of Civil Appeals, pages 18-19, wherein is recited:

> "The effect of a judgment giving fee simple title to land in controversy to the State of Texas, who is not a party, would be confusing, to say the least. No decree should be entered adjudicating the rights in land to a person or State who is not a party to the suit. If such decree is binding on anyone, it should be stricken because the party is not before the court; if it is not binding, it should be stricken because it has no place in the judgment, and will undoubtedly cause confusion to all who read it,"

referring to Transcript, page 3, wherein the parties to the suit are named:

> "City and County of Dallas Levee Improvement District, a Municipal Corporation,
>
> vs.
>
> F. O. Wilemon and A. E. Wilemon,"

and Petitioners' application for Writ of Error, page 9, wherein is recited:

> "The Courts below seemed to rely upon plaintiffs' contention that the scanty set of facts in the plaintiffs' affidavits regarding the appointment of the Board of Appraisers and its subsequent levying of benefits to abutting land, including the land in controversy, would be effective against defendants as divesting them of any interest they might have had in controversy. To divest the title claimed by defend-

ants to the Board of Appraisers would have been required to have condemned the land and actually pay reasonable compensation in advance of the taking of the land, unless the jury found that the 1926 survey correctly set the boundary. Plaintiffs have not met their burden of proof as to a taking or condemnation of the land, and in fact plaintiffs admit in their affidavitts that the abutting land was assessed benefits. Art. 1, Section 17 of the Texas Constitution required the payment of compensation in advance of taking. Dallas County Levee Improvement District v. Ayres is in point when the court says:

> " 'This being true, it is apparent that proposition to the effect that the construction of a levee and the assessment of damages against the lands constitutes, in any sense, a taking of private property for public use, is altogether untenable'.")

(c) Questions for jury determination disregarded. (See Petitioners' brief to Court of Civil Appeals, page 5, wherein is recited:

> "Defendants filed a sworn controverting affidavit of O. R. McElya showing that there was a great variation between the field notes in the deed to defendants and the boundary line alleged by plaintiffs.)"

3. In the Supreme Court

(a) From Petitioners' Application for Writ of Error to Supreme Court, page 8, wherein is recited:

> "Defendants filed a sworn controverting affidavit of O. R. McElya (Tr., p. 40), showing that there was a great variation between the field notes in the deed to defendants and the boundary line alleged by plaintiffs,"

and page 15 wherein is recited:

> "Art. 1, Section 15, Constitution of Texas, is quoted as follows:
>
> > " 'The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.'
>
> "This was a jury trial. We contend there was ample evidence offered by defendants to put in issue (1) that the Garrett survey was correct and that substantially all of the land claimed by plaintiffs was not in the Trinity River bed, and belonged to defendants under their deed; (2) that neither the 1926 survey, nor the plaintiffs' survey correctly placed the west bank of the Trinity River as defendants' property.
>
> "It seems clear that the court below erred in withdrawing the case from the jury without submitting these issues to the jury. This violates the Constitution above quoted.")

(b) Taking private property for public use. (See Petitioners' Motion for Rehearing to Supreme Court, page 3, wherein is recited:

> "Such an attempt to adjudicate a boundary is contrary to the United States Constitution. Amendment 5 of the U. S. Constitution recites:
>
> > " '* * * nor shall private property be taken for public use without just compensation * * *.'
>
> "The Court's attention is called to the fact that the only proceeding that Plaintiffs can show has ever taken place by a branch of the State is that a map was prepared by the State Reclamation Engineer and

the Board of Supervisors of the Reclamation District (or at least approved by them), and filed for record 11-6-26; all that can be said of this map is that it is a man-made imaginary line.")

(c) Right of trial by jury, as an adjunct of "Due Process of Law." (See Petitioners' Motion for Rehearing to the Supreme Court, page 3, wherein is recited:

> "Defendants argue that such taking by the courts at this time is violative of Amendment 5 to the Constitution of the United States quoted above, and of Article 1, Section 15, of the Constitution of Texas, which recites:
>
> > " 'The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency,'
>
> and Article 1, Section 17 of the Constitution of Texas which recites:
>
> > " 'No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person * * *.")

(d) Deprivation of property without due process of law. (See Petitioners' Motion for Rehearing to Supreme Court, pages 4 and 5, wherein is recited:

> "Amendment 14, Section 1 of the Constitution of the United States recites: 'nor shall any State deprive any person of life, liberty, or property without due process of law; * * *.'
>
> "Defendants would show that under Article 1, Section 15 of the Constitution of Texas which is quoted

in defendants' brief with their application for Writ of Error, the proper process of law, trial before a jury, should be made available to Defendants. Disputed facts relating to the boundary of the Trinity River are numerous in this case, and yet Defendants are not permitted to have their rights of determination of those facts by a jury exercised because of the judgment of the lower court, the Court of Civil Appeals and the denial of a Writ of Error by this court. Deprivation of this right and loss of valuable property without being able to exercise this right amounts to confiscation of property without due process of law. In this connection Defendants were ready, able and willing to prove by their deeds of conveyance and by testimony of competent withnesses that Defendants' property did not and does not extend over the true and natural river bank of the Trinity River, and such matters, if considered by a jury, Defendants verily believe, would result in a jury's finding in Defendants' favor.")

(e) On the question of land being adjudged to belong to the State of Texas by *stare decisis*, where the case relied upon for stare decisis had no bearing upon the facts in issue. (See Petitioners' application for Writ of Error, page 25, wherein is recited:

"Application for Writ of Error in the Ray case was refused for want of merit, and, therefore, no phase of the case was approved by the Supreme Court. For that reason the Ray case cannot be stare decisis.")

(f) See Petitioners' Application for Writ of Error, page 15, wherein is recited:

"Art. 1, Section 15, Constitution of Texas, is quoted as follows:

> " 'The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.'
>
> "This was a jury trial. We contend there was ample evidence offered by defendants to put in issue (1) that the Garrett survey was correct and that substantially all of the land claimed by plaintiffs was not in the Trinity River bed, and belonged to defendants under their deed; (2) that neither the 1926 survey, nor the plaintiffs' survey correctly placed the west bank of the Trinity River at defendants' property.")

(g) On the question of fact regarding trees which are standing on Petitioners' land, trees which Petitioners' witness testified as being the type of tree which would not grow within and between the banks of a river, see Petitioners' Motion for Rehearing to Supreme Court, wherein is recited:

> "In the case at hand there has never been fixed a definite boundary marker. That boundary is still to be determined. It will be for the purposes of determining where Mother Nature, in ages past, threw up a barrier over which the Trinity River would not pour its waters, in front of which the land would be waterlogged much of the time and in back of which great trees would grow that could not grow in waterlogged lands—trees like those now thriving upon Defendants' land—trees that should be called to the attention of the only legal and correct triers of facts—particularly facts of nature, a jury of 12 men. Defendants submit that no law except the law of nature should determine Defendants' rights in this case. Man-made laws cannot prevent trees from growing up and beyond the natural habitat of river waters; Defendants would leave the river to the State and plead only for

> their portion of Mother Nature's bountiful lands that were meant to be the native and natural birthplace and life-long nurturing ground of great trees THAT ONLY GOD CAN MAKE. Thus far He has made them only in non-water-soaked soil; *none have been made inside of the natural banks of a river such as the Trinity.*"

Petitioners urge that the Court below has, by entering judgment ordering Petitioners to vacate the land which Petitioners now have in their possession, in effect, deprived Petitioners of the said land without due process of law in two respects, namely:

1. The land was not taken by condemnation procedure with just compensation paid therefor, a proceeding which Petitioners and/or their ancestors in title have never had the privilege of defending.

2. The order depriving Petitioners of the land was entered without submitting disputed fact issues to a jury; a jury upon which Petitioners were relying to determine the facts; a due process of law was then denied to Petitioners in thus taking away from Petitioners the valuable right of having disputed fact issues determined by a jury.

This is contrary to the holding in *Zabowski v. Loerch, 237 N. W. 386*, which holds that an owner of real estate has the exclusive right to possession of it and cannot be deprived thereof without due process of law.

The processes of law which Petitioners were never given the opportunity to defend, are those dealing with condemnation and payment for land condemned as set out in

Articles 7981, 7993, 7994 and 7995 of *Vernon's Civil Statutes of Texas, 1925*, which set out clearly the steps which a public body shall pursue in order to take property from a private citizen by exercise of its right of eminent domain.

Thus Petitioners have not been given the protection of Amendment XIV of the Constitution of the United States, which states: "* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *," and Amendment 5 of the said Court which recites in part: "* * * nor shall private property be taken for public use without just compensation * * *."

The judgment about which Petitioners complain attempts to take from Petitioners' land that is between a meander line shown upon a map and the center of the river, which is contrary to *Hardin v. Jordan, 140 U. S. Sec. 71*, in which the Supreme Court held that a meander line does not limit a land title, and *The State v. Sun Oil Co., 114 S. W. 2d 936* and *State v. Atlantic Producing Co., 110 S. W. 2d 953*, which held that a meander line is made to get the approximate area of land * * * since * * * title extends to and with the meanders of the stream. Thus the method of taking by said judgment is not according to any known "due process of law."

Nor can Petitioners be deprived of title by virtue of Art. 5305-a of *Vernon's Civil Statutes of Texas, 1925*, for a mere meander line can be attacked under that statute.

Nor can it be said that Petitioners be deprived of their lands by due process of law by the doctrine of stare decisis,

because of the holding of *Allen v. Draper, 204 S. W. 783,* which holds that a case fixing a boundary line upon an adjoining tract does not fix the boundary of the neighboring tract, the Supreme Court saying in such case:

> "As we understand the rule of Stare Decisis in this state, it is one of precedent and authority. It is based upon the statement of a principle, rule or proposition of law by the Supreme Court, or the highest court in the state having jurisdiction of the particular case. In a boundary suit, the adoption of a particular legal proposition, such as a rule of construction, generally results in a judgment establishing a certain boundary. The doctrine of stare decisis, however, is based upon the legal principle or rule involved and not upon the judgment which results therefrom."

The only due process of law by which Petitioners can be deprived of the property in question is by procedure under Art. I, Sec. 17 of the Constitution of the State of Texas, which recites: "No person's property shall be taken * * * or * * * applied to public use without adequate compensation being made, unless by consent of such person * * *." In connection with such procedure a person is given a right of trial by jury on the question of damages. Art. I, Sec. 15 of said Constitution states that "the right of trial by jury shall remain inviolate * * *."

It is clear, therefore, that the judgment of the court below has the effect of taking Petitioners' property without due process of law.

WHEREFORE, Petitioners pray that this Honorable Court grant its most gracious writ of certiorari in order

that this case may be reviewed to the end that justice may be done, and that upon final hearing that judgment may be rendered as the law demands, setting aside the judgment of the Court of Civil Appeals and the Trial Court, and for such other and further relief, at law or in equity, to which Petitioners may be entitled.

Respectfully submitted,

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APPENDIX A

No. 63207-G

**IN THE DISTRICT COURT OF DALLAS COUNTY,
134th JUDICIAL DISTRICT OF TEXAS**

CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, A MUNICIPAL CORPORATION, ET AL.,

VS.

F. O. WILEMON AND A. E. WILEMON

FINAL JUDGMENT

On the 3rd day of November, A. D., 1952, this cause came on regularly for trial. The Plaintiffs, CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, a municipal corporation, and DALLAS COUNTY FLOOD CONTROL DISTRICT, a municipal corporation, and the Defendants, F. O. WILEMON AND A. E. WILEMON, all appeared and by their attorneys announced ready for trial.

THEREUPON came a jury of twelve good and lawful men who were duly impaneled and sworn the facts to try.

The case proceeded to trial before the Court and jury, and one of said jurors being excused by the Court on agreement of counsel, and the case proceeded to trial by agreement of counsel before the remaining eleven jurors duly impaneled and sworn. At the close of all of the evidence, the Plaintiffs, CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT and DALLAS COUNTY FLOOD CONTROL DISTRICT, filed their motion requesting the Court to instruct the jury to return a verdict in their behalf and against the Defendants, and/or that the Court withdraw the case from the jury and render judgment for the Plaintiffs as prayed, and the Court after hearing said motion and the arguments thereon was of the opinion that there was no issue of fact to be submitted to the jury and that said motion should be sustained to the extent that this cause should be withdrawn from the jury and the jury discharged, and the jury was thereupon on the 6th day of November, A. D., 1952, discharged from further consideration of this cause; and the Court upon affidavits, depositions, admissions and evidence on hearing on Plaintiffs' Motion for summary judgment and the undisputed evidence on trial in this cause is of the opinion that the law and the facts are for the Plaintiffs, CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, and DALLAS COUNTY FLOOD CONTROL DISTRICT, and against the Defendants, F. D. WILEMON and A. E. WILEMON; that the State of Texas is the fee simple owner of the hereinafter described lands subject to the right of the use

and possession of the same for flood control and reclamation purposes of the Plaintiffs, CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT and DALLAS COUNTY FLOOD CONTROL DISTRICT, as provided in the Plan of Reclamation of said Levee District filed with the County Clerk of Dallas County, Texas, on the 6th day of November, 1926, as amended, and that the high or cut bank of the old channel of the Trinity River which divides the land of the Defendants from the land of the Plaintiffs is that line designated as the meander line of the river in the survey made in 1926, and reflected in the Plan of Reclamation and the Report of the Commissioners of Appraisement on file in the Office of the County Clerk of Dallas County, Texas, being further shown on the Map and Plat of Industrial Improvement Project Addition, Unit One and Unit Two, recorded in Volume 5, page 415, et seq. of the Map and Plat Records of Dallas County, Texas, and that the fill, dirt, debris, improvements, and encroachments in the old channel of the Trinity River placed or caused to be placed, constructed or erected therein should be removed by the Defendants, and that the Defendants and each of them should be permanently and perpetually enjoined from trespassing in or upon said old channel of the Trinity River and from filling, refilling, or placing dirt, rock, debris or any other obstructions therein. That the property in dispute and the encroachments therein by the improvements, dirt, debris, fill and asphalt, are more fully set out on the map and plat of said lands attached to Plaintiffs' petition marked Exhibit "A," which

is here referred to and made a part hereof for all purposes.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

(1) Plaintiffs, CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT and DALLAS COUNTY FLOOD CONTROL DISTRICT, do have and recover of and from the Defendants, F. O. WILEMON and A. E. WILEMON, right of the use and possession of the following described land situated in Dallas County, Texas, and being a part of the old channel of the Trinity River designated on the Plan of Reclamation of the City and County of Dallas Levee Improvement District for storage, drainage, and conduit purposes, said lands being all that portion of the Old Channel lying East of the land which is shown on the Map and Plat of Industrial Improvement Project Addition as Lot 4, Block 76, Industrial Improvement Project Addition, Unit One and Unit Two, according to the Map and Plat thereof, recorded in Volume 5, page 415, Map and Plat records of Dallas County, Texas, and being further shown and set out in the map and plat attached to Plaintiffs' First Amended Original Petition as Exhibit "A" and further described as follows:

> Being that part of the old channel of the Trinity River designated as channel storage area on the Plan of Reclamation immediately Northeast of and adjoining the property of the defendants described in Exhibit "B" attached to Plaintiffs' First Amended Original Petition, hereby referred to and made a part

hereof, and being the land shown in pink on the plat marked Exhibit "A" attached to Plaintiffs' First Amended Original Petition, hereby referred to and made a part hereof for all purposes, being an irregular shaped tract beginning at the Northeast corner of the Defendants' tract as described in Exhibit "B"; thence in a Northeasterly direction along the Southeast line of Corinth Street approximately 100 feet to a point; thence running in a Southeasterly direction approximately 270 feet to a point; thence in a Southwesterly direction approximately 152 feet to a point on the Defendants' Northeast boundary line; thence in a Northerly and Northwesterly direction along the Defendants' Northeast boundary line approximately 281 feet to the place of beginning, all as shown in pink on the plat designated as Exhibit "A," aforesaid, and attached to Plaintiffs' First Amended Original Petition, where the dimensions of said tract are fully set out.

(2) That Plaintiffs, CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, and DALLAS COUNTY FLOOD CONTROL DISTRICT have their writ of possession to the above described land.

(3) That the Defendants, F. O. WILEMON and A. E. WILEMON and each of them, are hereby mandatorily enjoined and directed to remove all structures, buildings, dirt, debris, asphalt, or other obstructions and encroachments placed or allowed to be placed in said old channel of the Trinity River by Defendants, being the lands and premises above described and being described and set out on the Plat marked Exhibit "A" attached to Plaintiffs' First Amended Original Petition which is here referred to and made a part hereof for all purposes, and that such re-

moval be accomplished by the said Defendants prior to the 1st day of April, 1953.

(4) That the Defendants and each of them are hereby permanently and perpetually enjoined from trespassing in or upon and from filling in, refilling or placing dirt, rock, debris or any other obstructions in said old channel of the Trinity River hereinabove described.

(5) That all claims, rights and titles asserted by the Defendants and each of them are hereby denied and adjudged against said Defendants and each of them.

(6) That all costs herein are taxed against the Defendants jointly and severally.

To which action of the Court the Defendants, in open Court excepted and gave notice of appeal for the 5th Supreme Judicial District.

DATED this the 19 day of December, 1952.

/s/ W. M. TAYLOR, JR.
Judge

APPENDIX B

WILEMON, et al.

v.

CITY & COUNTY OF DALLAS LEVEE IMP. DIST., et al.

No. 4975

COURT OF CIVIL APPEALS OF TEXAS
EL PASO

Dec. 16, 1953.
Rehearing Denied Jan. 6, 1954.

Bonney, Paxton & Wade, Herbert S. Paxton, Jr., Dallas, for appellants.

Bowyer, Gray, Thomas & Harris, Scurry, Scurry & Pace, Dallas, for appellees.

McGILL, Justice.

This was a suit in trespass to try title to an acre of land, more or less, alleged to lie in the river bed of the Old Trin-

ity River Channel in Dallas County, and for a mandatory injunction requiring defendants to remove certain improvements and fill placed on said land, and for an injunction to prevent defendants from placing other improvements thereon. Trial was to a jury, but at the close of all the evidence on motion of plaintiffs the court withdrew the case from the jury and found that the State of Texas was the fee simple owner of the land, subject to the right of use and possession thereof for flood control and reclamation purposes of plaintiffs, and granting plaintiffs such right, use and possession against defendants, and also the injunctive relief prayed for. Appellees were plaintiffs in the trial court and appellants were defendants. A further statement of the nature of the suit is deemed necessary at this point. The following appears from plaintiffs' petition:

> "(1) Plaintiffs are each governmental agencies created by the Legislature in accordance with the Conservation Amendment (article XVI, Sections 59a and 59b) of the Constitution [Vernon's Ann. St.] of this State.
>
> "(2) That in accordance with the statutes, a 'Plan of Reclamation' for the City and County of Dallas Levee Improvement District was approved by the State Reclamation Engineer, the Board of Supervisors of the District, and was filed for record on November 6, 1926.
>
> "(3) Said Plan of Reclamation provided for a change in the course of the channel of the Trinity River as the same existed at that time and the straightening thereof along a new channel constructed between the levees, and provided for a storage basin and area in the old channel of the Trinity River, as

indicated on the District Map, referred to and made a part thereof.

"(4) That said Plan of Reclamation provided and contemplated the continuing use of said old channel for channel and conduit purposes to carry water from creeks, storm sewers and other conduits to the sluice gates and pumping plants, and that the same was and is a necessary and requisite part of the Plan of Reclamation of the lands lying within the District.

"(5) That the meander lines of the old Trinity River Channel and storage basin were contained in the Report of the Commissioners of Appraisement.

"(6) The defendants own a tract of land adjoining the channel which was described by metes and bounds and the Defendants erected and constructed and caused to be erected and constructed fill, dirt, obstructions and improvements as shown and indicated on the maps and plat attached to the Plaintiffs' Petition and marked Exhibit 'A'.

"(7) That such encroachments constitute a serious interference with the channel storage facilities and area, to which Plaintiffs, under the Constitution and laws of this State have the exclusive right to the possession and use thereof."

Defendants answered by way of general denial and to the effect that under Article 7467b, R. C. S., Vernon's Ann. Civ. St., they claimed some right or interest in the land and stand ready, able and willing to comply with the provisions of said Article in order to perfect their title to the land; that on or about the 23rd day of March, 1949, the defendants placed valuable improvements on the land in good faith and expended therefor approximately $36,000 and that the plaintiffs had notice thereof but failed to pro-

hibit them from placing said improvements, to the defendants' damage in said sum.

Plaintiffs filed their motion for summary judgment with supporting affidavits, and defendants answered said motion with supporting affidavits, and answered further with a formal "Not Guilty" plea and with affirmative allegations that the land in controversy was not in said river bed, but belonged to the defendants and was a part of the adjoining land which admittedly belonged to the defendants, and claiming damages for improvements placed on said land in good faith, in the alternative.

The court below entered an order on July 30, 1952, sustaining the motion for summary judgment as to all questions except the boundary line between the disputed property and that admittedly owned by defendants, to which action of the court defendants duly excepted.

[1] By appropriate points appellants contend (1) that the Court erred in entering its order dated July 30, 1952, sustaining plaintiffs' motion for summary judgment in all respects except as to the question of boundary of the land in dispute; (2) erred in failing to enter judgment at the conclusion of the trial that plaintiffs take nothing; (3) erred in withdrawing the case from the jury and entering judgment against defendants without submission of fact issues to the jury; (4) erred in holding in its judgment that the State of Texas was the owner of fee simple title to the land in controversy; (5) erred in holding that plaintiffs were decreed the right to use and possession of a tract

of land, the same not being described by exact metes and bounds; (6) erred in issuing its mandatory injunction requiring defendants to remove an indefinite amount of fills and indefinite improvements, identified only as "that fill" and "those improvements" which defendants placed on the land in controversy; and (7) erred in neither allowing defendants nor submitting to the jury damages for improvements placed on the land in controversy in good faith by them. The following background of facts relevant to the present controversy is admirably stated in *Cox v. City & County of Dallas Levee Improvement Dist., Tex. Civ. App., 258 S. W. 2d 851, 854 (wt. ref. n. r. s.)*:

> "City and County of Dallas Levee Improvement District and Dallas County Flood Control District are bodies politic and corporate pursuant to Acts of the Legislature and Sec. 59(a), Art. 16, State Constitution, Vernon's Ann. St.; and were created as such for the purpose of constructing and maintaining levees and other improvements necessary for reclamation of lowlands subject to periodic overflow of the Trinity River adjacent to the City. In accordance with provisions of the Constitution and Statutes a Plan of Reclamation was approved, adopted, and filed for record Nov. 6, 1926 covering some 10,500 acres of land lying within Levee District boundaries and under which Plan the course of the Trinity was changed, straightened, and placed between levees; and the old channel set aside for drainage and conduit purposes and the storage of storm waters. At the same time a survey of the old channel was ordered by the Levee District and its Commissioners of Appraisement; and an 'on the ground' survey descriptive of the old channel so set apart under the Plan was incorporated in the report of the Commissioners of Appraisement and

filed for record in office of County Clerk, Nov. 28, 1926.

"The survey was undertaken under direction of T. C. Forrest, engineer for the Levee District, whose testimony on this trial was that the 1926 operation accurately surveyed the high or cut banks of the old channel, Trinity River, and meander lines established being monumented by iron pipes and witness trees."

As a matter of law the bed and channel of the old Trinity River unless conveyed or abandoned, remained the property of the State of Texas. *Ray v. State, Tex. Civ. App., 153 S. W. 2d 660 (w. r. w. m.)*. The defendant F. O. Wilemon, by deposition testified that appellants had received no conveyance to the property from the state. In other words:

"Q. Are you claiming any part of the land in controversy?

"A. I couldn't claim it if I didn't have title to it."

The affidavit of T. C. Forrest, a professional engineer attached to plaintiffs' motion for summary judgment was in part:

"The Plan of Reclamation states specifically where certain portions of the Old Channel of the Trinity River to be used for the storage of these storm waters and for the transmission of these waters to gravity sluiceway outlets or to pump stations. It therefore became necessary to definitely define the Old Channel of the Trinity River in order to safeguard it for the storage of these storm waters. In doing this meander lines were established along the high banks of the Trinity River from the Santa Fe railroad upstream

to the confluence of West Fork and Elm Fork prior to the time of their diversion into the new channel. The meander lines were carefully located and monumented by the establishment of iron pipe. The calls between the meander points were the results of precise instrument work by reading the angles from the vernier plate rather than from needle readings. In this procedure the angles are precisely recorded to within one minute of deviation. The survey of the meander lines of the Old Trinity River was undertaken in the year 1926 and was completed under my direction and control. I have now in my office the original field notes for each survey. The meander lines of the Old Trinity River as thusly surveyed were likewise set forth in the Report of the Commissioners of Appraisement of City and County of Dallas Levee Improvement District as the property lines abutting the Old River Channel. The Commissioners of Appraisement recognized this meander line as a boundary line between the Old Channel, which was to be used for storage, and the abutting property against which the Commissioners of Appraisement levied benefit assessments. In the subdivision of a large block of land in the Southeast portion of the District, the Industrial Improvement Project Addition recognized the boundaries of the meander lines as established by the Commissions of Appraisement in the plat that is reflected in Volume 5, Page 415, of the Map and Plat Records of Dallas County, Texas."

and the affidavit of Dick B. Granger, a professional engineer, also attached to the motion, was in part:

"The meander lines of the old Trinity River Channel and storage basin are contained in the Report of the Commissioners of Appraisement of City and County of Dallas Levee Improvement District. The said Plan of Reclamation has been carried out by City and County of Dallas Improvement District and is

now being maintained by said last above named District and by Dallas County Flood Control District and the old channel of the Trinity River has been and is now being used for the purposes set out hereinabove and as set out in the Plan of Reclamation referred to. * * * The meander lines of the old Trinity River and Storage basin have generally been recognized by the public and persons owning or claiming an interest in such property and lands. Heretofore, there was dedicated Industrial Improvement Project, Units Nos. 1 and 2, an Addition to the City of Dallas, Texas, and a map and plat of said addition was filed for record in Volume 5, page 415, Map and Plat Records of Dallas County, Texas, which map and plat was filed for record July 25, 1938, and recorded August 27, 1938. I am familiar with said Dedication Map and the same sets forth the confines, boundaries and meander lines of the old channel of the Trinity River, a copy of the same is attached hereto and made a part hereof."

* * * * *

"In the year 1951, a re-survey of the meander lines of the Old Trinity River was undertaken under my direction and control and on or about the 5th day of November, 1951, there was commenced under my said direction and control a re-survey of the meander lines in the vicinity of the above described tract of land, which re-survey was completed in February, 1952. In making the re-survey of the meander lines of the old Trinity River some of the original points could not be found, then adjustments were made between points as found and all points were relocated. In doing so the footsteps of the original surveyor were followed. The boundary line between the above described tract of land and the old channel of the Trinity River was relocated in this way. In establishing Point 12-W, the original survey notes establishing the meander lines of the old Trinity River, which I have in my possession and control, set forth and call for an

original survey witness tree, which in the survey undertaken beginning November 5, 1951 and ending in February, 1952, was found and relocated. The numbers of the points were used and set out in the original notes of the meanders of the Trinity River, which survey and notes were undertaken, and notes made in the year 1926, and have been in the possession of T. C. Forrest, Jr., or the firm of which he was and is a member and by whom I am employed.

"After the survey was completed I prepared and caused to be prepared a map and plat of the old meander line of the Trinity River, which constitutes the boundary line between the above described property and the old channel of the Trinity River, which map and plat is attached to the original petition filed in the cause of City and County of Dallas Levee Improvement District, a municipal corporation, et al. vs. F. O. Wilemon and A. E. Wilemon, No. 63207-G in the District Court of Dallas County, 134th Judicial District of Texas, and the same is hereby referred to and made a part hereof. That said survey and said map are an accurate and correct survey and map of the old channel of the Trinity River set aside for storage, drainage and conduit purposes, and the above described tract of land."

Defendants controverted the motion on various grounds and attached to their controverting affidavit an affidavit of O. R. McElya, a professional engineer, to effect that he had examined a resurvey of the 1926 survey made in 1952 by Cotton and Forrest, and the general warranty deed introduced in evidence, and found a great discrepancy in such description in the boundary.

From the pleadings and affidavits it appears beyond issue that the field notes of the meanders of the Old River

Channel were set forth in the Report of the Commissioners of Appraisement; therefore the court did not err in holding that

> "* * * by examining the pleadings and the evidence before it, and having heard and fully considered the same together with supporting and controverting affidavits and evidence and by interrogating counsel is of the opinion that there is no genuine issue of fact except as to the correct boundary line between the old channel of the Trinity River as set aside for storage, drainage and conduit purposes in the Plan of Reclamation of City and County of Dallas Levee Improvement District filed in the Office of the County Clerk of Dallas County, Texas, on November 6, 1926, the exact meander lines of which were established by a survey set forth in the Report of the Commissioners of Appraisement of City and County of Dallas Levee Improvement District filed in the office of the County Clerk of Dallas County, Texas, and as further shown and described in the map and plat of Industrial Improvement Project, Units One and Two, recorded in Volume 5, page 413, et seq., Map and Plat Records of Dallas County, Texas, and said property of the Defendants described in Exhibit 'B' of Plaintiffs' material allegations of Plaintiffs' First Amended Original Petition are true and correct * * *"

and in rendering summary judgment accordingly. Rule 166-A, T. R. C. P.

[2, 3] On the trial of the case the evidence was uncontroverted that the Survey of 1926 which surveyed the meander lines of the Old Channel of Trinity River set aside for the storage of storm waters was accurate and correct. Defendants' witness Garrett stated that the land had not

accreted from natural causes since 1926. As a matter of law the State had not abandoned the channel of the old river, since it was used for transmission and storage of storm waters. Section 3, Art. 7467b, R. C. S. There was no question but that the resurvey of 1952 correctly located the 1926 survey on the ground. Defendants did not contend otherwise. Their sole contention seems to be that the 1926 survey is incorrect because it would place large trees in the bed or channel of the old river. This question was foreclosed in *Ray v. State*, supra, which involves 151.47 acres of land of which the land in suit was a part; therefore there was no issue of fact to submit to the jury, and the court did not err in withdrawing the case and rendering judgment for plaintiffs. We are also of the opinion that *Ray v. State* and *Cox v. City & County of Dallas Levee Improvement District*, supra, are stare decisis of the law in this case, and for these reasons all of appellants' points are overruled and the judgment of the trial court is affirmed.

Office - Supreme Court, U.S.
FILED
JUL 12 1954
HAROLD B. WILEY, Clerk

No. 208

In the

SUPREME COURT OF TEXAS

F. O. WILEMON, *et al.*,
Petitioners,

v.

CITY AND COUNTY OF DALLAS LEVY IMPROVEMENT DISTRICT, *et al.*,
Respondents.

PETITION FOR WRIT OF ERROR ON BEHALF OF F. O. WILEMON AND A. E. WILEMON IN CAUSE NO. 4975 IN THE COURT OF CIVIL APPEALS FOR THE 8TH SUPREME JUDICIAL DISTRICT OF TEXAS, AT EL PASO, TEXAS, WHEREIN F. O. WILEMON AND A. E. WILEMON ARE APPELLANTS, AND CITY AND COUNTY OF DALLAS LEVY IMPROVEMENT DISTRICT, AND DALLAS COUNTY FLOOD CONTROL DISTRICT, ARE APPELLEES.

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No.....

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F. O. WILEMON, *et al.*,
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To the Supreme Court of Texas:

STATEMENT OF THE CASE

This is a suit in Trespass To Try Title for an acre of land, more or less, alleged to lie in the river bed of the old Trinity River Channel in Dallas County, and for a

mandatory injunction requiring defendants to remove improvements and fill placed on said land, and for an injunction to prevent defendants from placing other improvements on said land. Plaintiffs filed their motion for summary judgment with supporting affidavits, and defendants answered said motion with supporting affidavits and answered further with a formal "Not Guilty" plea and with affirmative allegations that the land in controversy was not in said river bed, but belonged to the defendants in fee simple and had accreted to the defendants and was a part of the adjoining land which admittedly belonged to the defendants, and claiming damages for improvements placed on said land in good faith, in the alternative.

The court below entered an order on July 30, 1952, sustaining the motion for summary judgment as to all questions except the boundary line between the disputed property and that admittedly owned by defendants, to which action of the court defendants duly excepted.

Upon trial on the merits before a jury, the court took the case from the jury and entered its judgment on December 19, 1952, in favor of plaintiffs, decreeing title in fee simple to said land in the State of Texas (who was not a party), use and possession in plaintiffs, and issuing a mandatory injunction requiring defendants to remove all improvements and fill placed on said land by them, and enjoining defendants from further improving said land. Defendants perfected their appeal to the Court of Civil Appeals at Dallas, and the same was transferred

to the Court of Civil Appeals at El Paso, which court affirmed the trial court's judgment. Motion for rehearing was filed within the time required, was overruled on January 6, 1954.

The Court of Civil Appeals affirmed the judgment of the Trial Court, holding that the Trial Court did not err in the following particulars: (1) In entering the Trial Court's order of July 30, 1952, sustaining the plaintiffs' motion for summary judgment; (2) In failing to enter a judgment at the conclusion of the trial that the plaintiffs, City and County of Dallas Levy Improvement District, and Dallas County Flood Control District, take nothing; (3) In withdrawing the case from the jury and entering judgment against defendants without submission of fact issues to the jury; (4) In upholding in the Trial Court's judgment that the State of Texas was the owner in fee simple of the land in controversy; (5) In upholding that the plaintiffs were decreed the right to use and possession to a tract of land, the same not being described sufficiently to identify the same; (6) In upholding the Trial Court's mandatory injunction requiring defendants to remove an indefinite amount of fill and indefinite improvements, identified only as "that fill" and "those improvements," which defendants placed on the land in controversy; (7) In neither allowing defendants, nor submitting to the jury, damages for improvements placed on the land in controversy in good faith by defendants.

GROUNDS OF JURISDICTION OF THE SUPREME COURT

The Supreme Court has jurisdiction of this case under the following subdivisions of *Article 1728, Revised Civil Statutes of Texas, 1925:*

1.

Under Subdivision 2, since the Court of Civil Appeals held differently from a prior decision of the Court of Civil Appeals at Dallas in the case of *Cox v. City and County of Dallas Levy Improvement District, 258 S. W. 2d 858,* in the following respects:

In the instant case the Court of Civil Appeals held that the *Ray v. The State, Court of Civil Appeals, 153 S. W. 2d 660,* was conclusive and binding upon the parties in the instant case on the theory of stare decisis; whereas, the Court of Civil Appeals at Dallas, held in the *Cox* case that the *Ray v. The State* case was not, under the theory of stare decisis, binding upon the parties in the *Cox* case, both cases involving land which was involved in the *Ray* case.

2.

Under Subdivision 6, since the Court of Civil Appeals made several errors of substantive law, which affect the judgment, and this is not a case in which the jurisdiction of the Court of Civil Appeals is made final by statute.

POINTS OF ERROR

FIRST POINT

The error of the Court of Civil Appeals in holding that the Trial Court's order dated July 30, 1952, sustaining the plaintiffs' motion for summary judgment, was supported by the evidence, in spite of the fact that there was no evidence to support said order. (Germane to Assignment of Error No. 2.)

SECOND POINT

The error of the Court of Civil Appeals in holding that there was any evidence to support the final judgment of the Trial Court, and the error of the Court of Civil Appeals in not holding that the plaintiffs should take nothing. (Germane to Assignments No. IVa and b.)

THIRD POINT

The error of the Court of Civil Appeals in refusing to set aside the judgment of the Trial Court by reason of the refusal of the Trial Court to submit a fact issue to the jury. (Germane to Assignment No. 3.)

FOURTH POINT

The error of the Court of Civil Appeals in upholding the Trial Court's judgment that the State of Texas was the owner in fee simple to the land in controversy, the State of Texas being no party in the suit.

FIFTH POINT

The error of the Court of Civil Appeals in upholding the judgment of the Trial Court in giving right to use and possession of the land in controversy to plaintiffs, the land not being described in the judgment or in the pleadings so that it could be identified. (Germane to Assignments No. IVa and b.)

SIXTH POINT

The error of the Court of Civil Appeals in upholding that part of the Trial Court's judgment issuing a mandatory injunction requiring the defendants to remove an indefinite amount of fill and indefinite improvements, identified as "that fill" and "those improvements," which defendants placed on the land in controversy. (Germane to Assignment No. IVb.)

SEVENTH POINT

The error of the Court of Civil Appeals in upholding the judgment of the Trial Court, even though there were no damages allowed defendants for improvements placed on the land in controversy in good faith by the defendants, and even though the Court refused to submit such issues to the jury. (Germane to Assignment No. IVe.)

EIGHTH POINT

The error of the Court of Civil Appeals in holding that plaintiffs were entitled to judgment on the theory of stare decisis under Ray v. the State and County, and

Cox v. the City and County of Dallas Levy Improvement District.

FIRST POINT—(Restated)

The error of the Court of Civil Appeals in holding that the Trial Court's order dated July 30, 1952, sustaining the plaintiffs' motion for summary judgment, was supported by the evidence, in spite of the fact that there was no evidence to support said order.

STATEMENT

Plaintiff filed an affidavit of T. C. Forest (Tr., p. 25) in support of his motion for summary judgment setting out the plan of reclamation of the City and County of Dallas Levy Improvement District, setting out a survey of the land in the District in 1926, the use of said survey on a map in Report of the Board of Appraisers, the levy of *benefit assessments* against the abutting lands.

Plaintiffs also filed an affidavit of Dick B. Granger (Tr., p. 29) setting out the plan of reclamation of said District, the survey he supervised in 1951-52 relocating the 1926 survey, preparation by him of a map from his survey showing boundary between defendants' property and river channel and referring to deed whereby defendants acquired their property and use therein of the same calls as was used in the 1926 survey. No definite bearings and distances were given for the alleged river bank adjoining defendants' property.

Defendants filed a sworn controverting affidavit of O. R. McElya (Tr., p. 40) showing that there was a great variation between the field notes in the deed to defendants and the boundary line alleged by plaintiffs.

Defendants also filed an affidavit (Tr., p. 38) by them setting out many other defenses, among them that plaintiffs' remedy lies in Trespass to Try Title.

Defendants plead Not Guilty (Tr., p. 20) to plaintiffs' plea of Trespass to Try Title (Tr., p. 9).

Defendants introduced their deed to the property adjoining the disputed property in evidence (S. F., p. 128).

ARGUMENT

This is a Trespass to Try Title case. The burden is on plaintiffs to show their title superior to that of defendants. In proving up a motion for summary judgment plaintiffs must prove such title by affidavits. To do this they must prove from whom they deraigned title and when acquired. There is a complete absence in plaintiffs' affidavits of any mention of the source of their claim to title. Nevertheless, defendants put in issue the title by affidavits and by a plea of Not Guilty.

Plaintiffs relied in its pleadings and affidavits upon a survey made by Mr. Forest in 1926 for the purpose of setting up benefits and damages to land adjoining the proposed storage area. Defendants plead by trial amendment at the hearing on the motion for summary judgment that the 1926 survey was not correct and also plead "Not Guilty" to the trespass to try title.

The Courts below seemed to rely upon plaintiffs' contention that the scanty set of facts in the plaintiffs' affidavits regarding the appointment of the Board of Appraisers and its subsequent *levying of benefits* to abutting land, including the land in controversy, would be effective against defendants as divesting them of any interest they might have had in the land in controversy. To divest the title claimed by defendants the Board of Appraisers would have been required to have condemned the land and actually pay reasonable compensation in advance of the taking of the land, unless the jury found that the 1926 survey correctly set the boundary. Plaintiffs have not met their burden of proof as to a taking or condemnation of the land, and in fact plaintiffs admit in their affidavits that the abutting land was assessed benefits. *Art. 1, Section 17 of the Texas Constitution* requires the payment of compensation in advance of taking. *Dallas County Levy Improvement District v. Ayers* is in point when the court says:

> "This being true, it is apparent that proposition to the effect that the construction of a levee and the assessment of damages against the lands constitutes, in any sense, a taking of private property for public use, is altogether untenable."

The Court in *Burgess v. City & County of Dallas Levy Dist.* said:

> "In other words, if the legislature has made a valid delegation of power, the agency to which it has been delegated cannot exercise such power merely by unexpressed intention."

Insofar as the plaintiff Dallas County Flood Control District is concerned, if it contends that its claim to the property in controversy is derived from the Commissioners of Appraisement in 1926, then it would have been enjoying its interest therein twenty years before its birth, since it is alleged in plaintiffs' petition to be created under the Acts of 1946.

Plaintiffs, we would judge from their affidavits, place strong emphasis upon the 1926 survey having some impregnable significance. Yet it is admitted to be a mere man-made meander line. It is not claimed to be *the meander* of the river. The U. S. Supreme Court in *Hardin v. Jordan* holds that a meander line does not limit a grantee's title. *State v. Atlantic Producing Co., State v. Sun Oil Co.* and *State v. Arnim* all hold that a meander line is merely made to get the approximate area of land, and does not limit a grantee's title, since such title extends to and with the meanders of the stream.

Art. 5305A provides that a survey made in the original patent by the State to a patentee is binding, but even this type of survey can be attacked if it is merely a meander line on a stream. There appears to be no other statute in the law of this State giving any particular survey any seniority over any other as a matter of law.

Defendants' deed, introduced in evidence at the hearing on the motion, conveys the land *to the* and *with the* meanders of the river, and since no due process of law has taken title from them, they have the right to prove

the true meander of the river, and thus plaintiffs' burden was not met.

SECOND POINT—(Restated)

The error of the Court of Civil Appeals in holding that there was any evidence to support the final judgment of the Trial Court, and the error of the Court of Civil Appeals in not holding that the plaintiffs should take nothing.

STATEMENT

Plaintiffs' evidence by the witness Dick Grainger was to the effect that a survey was made by Grainger of the old channel in 1950 and 1951, as revised on June 30, 1952. Plaintiffs introduced certain maps setting out the boundary lines of the Trinity River, but in no case was any testimony introduced to show the source of title or the extent of title which plaintiffs claimed. The maps in evidence have no definite bearing and distance for the alleged river bank.

ARGUMENT

Respondents would doubtless say that the court takes judicial notice of his title. It may be that a court takes judicial notice of the possibility of a Levy District acquiring a right to use and a right to possession of the land, but a court cannot take judicial notice of the location of the land, the exact field notes of the land, the exact time of the taking of the interest by the levy dis-

trict. It is our view that in order to complete the proof necessary to make a case, the respondents must have introduced into evidence the plan of reclamation, the order of the Board of Appraisers setting out exactly the description of the land, the extent of plaintiffs' interest and the effective date of such interest. Otherwise, we might assume that every levy district in the State of Texas owns every foot of land in the county in which it does business or at least every foot of land within the confines of its district. The court cannot take judicial notice of the order of the Board of Appraisers.

The case of *Pfeffer v. Mahnke* holds as follows:

> "Courts cannot in one case take judicial notice of their own records in another and different case."

This rule is also laid down in *Armendiaz v. De La Serna, 40 Tex. 291.* The rule is also set out by *McCormick and Ray* in their work on *Texas Evidence, in Section 98, page 160.*

The plaintiffs having failed to prove definitely the bearings and distances along defendants' property where he claimed the river bank to be, plaintiffs' proof entirely fails.

There being no evidence of the plaintiff Dallas County Levy Improvement District acquiring any ownership to the disputed property, the Court should have rendered judgment that said plaintiff take nothing. The other plaintiff, the Dallas County Flood Control District, was not organized until after 1945, having been organized under an Act of the Legislature passed in 1945. Even if

by some stretch of the imagination the Dallas County Levy Improvement District made a prima facie case on its title, certainly the Dallas County Flood Control District has wholly failed in that there is certainly no evidence of any facts relative to title vesting in said plaintiff after the proceedings before the Board of Appraisers, all of which occurred in 1926 some twenty years prior to the creation of said plaintiff, Dallas County Flood Control District.

THIRD POINT—(Restated)

The error of the Court of Civil Appeals in refusing to set aside the judgment of the Trial Court by reason of the refusal of the Trial Court to submit a fact issue to the jury.

STATEMENT

The trial of the case on the merits was on the defendants' third amended answer (Tr., p. 44), which plead Not Guilty, claimed fee simple title in defendants; that said disputed land is accreted to defendants' land, that no part thereof was in the Old Trinity River Channel since prior to the year 1926 and that the surveys relied upon by plaintiffs were in error.

Defendants' evidence established the following facts:

(a) Blaine Garrett, a qualified surveyor, surveyed the disputed property personally. (S. F., p. 36, line 21, p. 37, line 2.)

(b) Defendants' deed conveying the property immediately adjoining the disputed property (S. F., p. 128)

which conveys to defendants to and with the Old Trinity River meanders (S. F., p. 129, lines 4 to 18).

(c) Defendants' map reflecting the position of the river in 1842, as shown by the 1842 Survey made in connection with the patenting of the W. S. Beaty Survey (S. F., pp. 45, 49).

(d) The 1926 Survey did not correctly show the high bank of said river (S. F., pp. 52-54).

(e) Map showing meander of river bank at disputed property from Garrett Survey (S. F., pp. 59-61), showing that the only encroachment in the river channel is 20 to 30 feet of one masonry building, the rest being on land conveyed to defendants by defendants' deed.

(f) The 1926 Survey does not properly locate the meanders of the Old Trinity River (S. F., pp. 109-110).

(g) Plaintiffs' witness, Granger, admitted the 1926 survey was not accurate (S. F., p. 25) on cross-examination.

(h) Garrett testified that trees 70 and 80 years old which cannot live in a river bed, one still standing in the disputed land (S. F., pp. 51, 52, 53).

Plaintiffs introduced no evidence as to plaintiffs' claim to title.

The case was tried before a jury, and at the conclusion of the evidence, the court withdrew the case from the jury and rendered judgment for plaintiffs, which defendants excepted. (Tr., pp. 53-4.)

ARGUMENT

Art. 1, Section 15, Constitution of Texas is quoted as follows:

> "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

This was a jury trial. We contend there was ample evidence offered by defendants to put in issue (1) that the Garrett survey was correct and that substantially all of the land claimed by plaintiffs was not in the Trinity River bed, and belonged to defendants under their deed. (2) That neither the 1926 survey, nor the plaintiffs' survey correctly placed the west bank of the Trinity River at defendants' property.

It seems clear that the court below erred in withdrawing the case from the jury without submitting these issues to the jury. This violates the Constitution above quoted.

In the *Masterson* case cited, the trial court instructed the jury to find for one party against other parties for cancellation of an instrument in writing and for $1,000.00 damages, but submitted issues as to exemplary damages. The Court of Civil Appeals had to say:

> "This was error, as said instructions withdrew from the jury the material issues presented by the pleadings of the plaintiffs in error in answer to the cross-action of defendants in error, Cline, above set out, in support of which there was ample evidence introduced, requiring the submission of same to the determination of the jury * * *.

> "The right of trial by jury thus invaded amounted to a denial of this inestimable right, guaranteed to litigants by the organic law of the land, by which a fair and impartial legal trial, according to the established forms of law, is guaranteed to all persons alike, and without the observance of which, it cannot be said that the litigant prejudiced thereby has had his day in court."

Evaluating the defendants' evidence, we believe that the deed of defendants to the land, establishing his east line along the meanders of the west bank of the Trinity River, itself makes an issue of fact as to where such line is. Garrett, the surveyor of many rivers, with his exhibits of his survey of the west bank of the Trinity at defendants' property, and with his undisputed testimony that the pecan and elm tree on the disputed land were 70 to 80 years old, and they would not have lived had that land been in the river bed within the last 70 or 80 years.

We reurge the argument and authorities under Second Point of this brief in connection with this Third Point.

FOURTH POINT—(Restated)

The error of the Court of Civil Appeals in upholding the Trial Court's judgment that the State of Texas was the owner in fee simple to the land in controversy, the State of Texas being no party in the suit.

STATEMENT

The State of Texas was not a party to this suit, having never been named a party, having never been served

with citation, and having never appeared nor answered. (Tr., p. 3.)

ARGUMENT

The effect of a judgment giving fee simple title to land in controversy to the State of Texas, who is not a party, would be confusing, to say the least. No decree should be entered adjudicating the rights in land to a person or State who is not a party to the suit. If such decree is binding on anyone, it should be stricken because the party is not before the court; if it is not binding, it should be stricken because it has no place in the judgment, and will undoubtedly cause confusion to all who read it.

FIFTH POINT—(Restated)

The error of the Court of Civil Appeals in upholding the judgment of the Trial Court in giving right to use and possession of the land in controversy to plaintiffs, the land not being described in the judgment or in the pleadings so that it could be identified.

STATEMENT

The judgment complained of provides that plaintiffs recover from defendants right to use and possession of a tract of land described by reference to defendants' land as described in the pleadings, and, using such reference as a point of beginning, using field notes of approximate distances and very indefinite bearings, thus not ade-

quately identifying the land subject to the judgment. (Tr., pp. 55-6.)

No more accurate description of the land was given in plaintiffs' evidence or exhibits.

ARGUMENT

The judgment in this cause gave no description of the land decreed to plaintiffs which could be used to identify the land on the ground. The judgment referred to a plat which was a part of the plaintiffs' petition, and went on to give approximate bearings and distances. The plat referred to had no bearings and distances on the west boundary. It would be absolutely impossible to identify the west boundary on the ground.

McDonald, Texas Civil Practice, has to say on this subject:

> "The description should fix the location of the land or the boundary with such particularity, and by reference existing objects on the ground, so that it may be determined by the officer with the aid of any record, map or document referred to in the judgment and the assistance of a surveyor."

The Court in *Hatton v. Burgess* held the judgment void when the description of the land was inadequate to identify the same. The Court said:

> "Notwithstanding the jury found that the land pointed out by J. M. Hatton to J. L. Burgess as the land conveyed by the Hatton-Burgess deed was not the land claimed by appellees in their disclaimer,

the award in their favor was simply by description in the Hatton-Burgess deed, which of itself identified no land. In this respect, the judgment does not have support in the pleadings and the verdict again, it must be said that the judgment is void for want of certainty. Construing the judgment in the light of the pleadings and the verdict, the sheriff could not put appellees in possession of the land awarded them by the description in the Hatton-Burgess deed, carried forward in the judgment, for the reason that it could not be located on the ground. It follows that the judgment of the lower court must be reversed and the cause remanded for a new trial."

We urge that the case at bar is identical in respect to this point with the *Hatton v. Burgess* case.

SIXTH POINT—(Restated)

The error of the Court of Civil Appeals in upholding that part of the Trial Court's judgment issuing a mandatory injunction requiring the defendants to remove an indefinite amount of fill and indefinite improvements, identified as "that fill" and "those improvements," which defendants placed on the land in controversy.

ARGUMENT

The judgment should be reversed because of the indefiniteness of the meaning of the court's order by mandatory injunction that the defendants remove indefinite obstructions, an indefinite amount of dirt and asphalt, unidentified buildings, structures and obstructions, and for the further reason that the land from which some

are to be removed is not identified. Defendants are further enjoined from placing obstructions on land which cannot be identified with certainty. The argument in the Fifth Point is reurged in this connection.

McDonald, in Texas Civil Practice quoting the Supreme Court in *Villalobes v. Holguin*, in this respect says:

> "An injunction or mandamus 'must be as definite, clear and precise as possible, and when practicable, it should inform the defendants of the acts he is restrained from doing (or required to do), without calling on him for inferences or conclusions about what persons may well differ and without leaving anything for further hearing'."

One could well imagine the difficulties the sheriff could have in enforcing the mandamus with respect to the removal of the dirt put on the unidentified piece of land by the defendants, or the "obstructions" placed thereon by defendants. What would an obstruction be to a sheriff? Would it be the same thing as an obstruction would be to the District Judge on a hearing for a motion for contempt because defendant did not remove that which defendants thought was not an obstruction? The Supreme Court thinks no further hearings should be necessary to interpret the meaning of the mandamus *(Villalobes v. Holguin)*. It appears to Petitioners that many hearings would be necessary: one to find the land where the encroachments might lie; one to determine what defendants put there; one to determine which dirt was already there before defendants were, so that it

would not be removed in trespass; one to determine what defendants permitted other persons to put there.

In short, the enforcement of this injunctive relief could go on and on into eternity.

The Supreme Court in *Watkins Land Co. v. Clements*, when defendant was enjoined from using water of Toyah Creek and Toyah Spring, said:

> "There is an entire want of description of the parts of the survey which are denied the right of irrigation. Hence, the judgment of the Court of Civil Appeals is so indefinite that it cannot possibly be enforced. * * *
>
> "For these reason the judgment of the Court of Civil Appeals must be reversed, and this cause remanded to the District Court for a new trial."

We respectfully urge the same.

SEVENTH POINT—(Restated)

The error of the Court of Civil Appeals in upholding the judgment of the Trial Court, even though there were no damages allowed defendants for improvements placed on the land in controversy in good faith by the defendants, and even though the Court refused to submit such issues to the jury.

STATEMENT

Defendants plead damages, in the alternative, under *Articles 7393-7399 Civil Statutes of Texas, 1925*, as amended (Tr., p. 45).

Defendant F. O. Wilemon testified that he thought that he had good reason to put improvements on the land in controversy because his deed called for the meanders of the old river channel and that he thought he put them on his land. (S. F., p. 112.)

The deed to defendants did take their land to and with the meanders of the river. (S. F., p. 128.)

Defendants' witness, Dewitt Knapp, testified as to the value of each improvement and of the land. (S. F., p. 123.)

ARGUMENT

The evidence is not disputed that the land in controversy was improved $37,000.00. The jury should have been submitted an issue as to whether defendants held said land in good faith at the time the improvements were put there. *Article 7394* provides that when the land is held in good faith and valuable improvements placed on the land, the judgment shall be against plaintiff for the difference in value of the land with improvements and the value without such improvements. It was error not to submit such an issue, if plaintiff was entitled to a judgment for possession and use of the land.

Even when the statute is not strictly complied with, equity requires that plaintiff pay for them when plaintiff stood by and allowed defendants to place said improvements on the land without warning him. The *Nilson v. Bonugli* case so holds.

EIGHTH POINT—(Restated)

The error of the Court of Civil Appeals in holding that plaintiffs were entitled to judgment on the theory of stare decisis under Ray v. the State and County, and Cox v. the City and County of Dallas Levy Improvement District.

STATEMENT

The Court of Civil Appeals held as a matter of law that *Ray v. The State* and *Cox v. The City and County of Dallas Levy Improvement District* was conclusive as a matter of law against Petitioners, defendants below, to the effect that the boundary line as set out in the 1926 survey was fixed as a matter of law, on the theory of stare decisis.

ARGUMENT

Plaintiffs below urged that the case of *Ray v. The State* was conclusive and binding upon defendants as to their boundary line between their property and the river channel. In the *Ray* case Ray had received a deed from the Land Commissioner of Texas to a large tract of land which included the land in dispute here. The State sued to set aside the deed to Ray on the theory that the land was not school land and thus was not salable land and thus the deed was void. Plaintiffs below contend that since the same land was involved, the *Ray* case is stare decisis of the question here.

We contend that the *Ray* case is not stare decisis or otherwise decisive or even remotely material because (1) the land here litigated was contained in a tract of land in the *Ray* case upon which no appeal was taken; (2) no principle or rule was laid down in the *Ray* case which precludes the issue of fact of the correct boundary line being presented in this case.

In the *Ray* case the Court says:

> "No claim is here made to the remaining 151 acres, but it is urged that if the judgment is reversed as to the 32 acres, then the judgment as to the 151 acres should be reversed so as to fully develop its status."

In the *T. & P. Ry. v. Wood* case the Court said:

> "Appellee strongly relies on the case of Saladiner v. Polanco, Texas Civil Appeals, 160 S. W. 2d 531, by the Austin Court of Civil Appeals, in which a writ of error was refused for want of merit by the Supreme Court. This authority is not controlling. Under Rule 463, T. R. C. P., prior to its amendment, which was applicable at the time, the Supreme Court in disposing of an application for writ of error 'refused for want of merit' where the judgment of the Court of Civil Appeals was correct, but the Supreme Court was not satisfied that the opinion of the Court of Civil Appeals in all respects had correctly stated the law.
>
> "* * * *.
>
> "Therefore, the Supreme Court by refusing the application for want of merit did not necessarily approve the holding of the Austin Court of Civil Appeals on the question of venue."

Application for writ of error in the *Ray* case was refused for want of merit, and, therefore, no phase of the case was approved by the Supreme Court. For that reason the *Ray* case cannot be stare decisis.

Horn v. Moody was a boundary dispute on a boundary between Surveys 1008 and 1009 and 162. The Trial Court held that the boundary of the disputed property was fixed by *Allen v. Draper, 204 S. W. 783*, on the theory of stare decisis. The case was reversed on appeal, holding that even though the *Allen* case was by the Supreme Court and although it fixed the boundary of the adjoining tract within the boundary line of Survey 1008, it was not binding on these parties or on Survey 1008. The Court said:

> "As we understand the rule of Stare Decisis in this state, it is one of precedent and authority. It is based upon the statement of a principle, rule or proposition of law by the Supreme Court, or the highest court in the state having jurisdiction of the particular case. In a boundary suit, the adoption of a particular legal proposition, such as a rule of construction, generally results in a judgment establishing a certain boundary. The doctrine of stare decisis, however, is based upon the legal principle or rule involved and not upon the judgment which results therefrom."

We would point out further that the land involved in the *Cox* case was not the same land as is involved in the instant case. The parties were not the same and Petitioners were not parties in the *Cox* case.

WHEREFORE, Petitioners submit that the judgment of the Court of Civil Appeals is erroneous in the respects here shown and therefore, prays that this Court will grant a writ of error to the Court of Civil Appeals to review its decision, and that upon final hearing, this Court will reverse the judgment of the Court of Civil Appeals, as to the matters complained of herein, and will render such judgment as the law demands to the end that justice may be done.

Respectfully submitted,

BONNEY, PAXTON AND WADE,

By.....

1133 Fidelity Union Building,
Dallas, Texas,
Attorneys for Petitioners.

Copies of this Application for Writ of Error have been delivered to Boyer, Gray, Thomas, Crozier & Harris, Attorneys for Respondents, Southwestern Life Bldg., Dallas, Texas.

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HAROLD B. WILLEY, Cle

NO. 208

IN THE

Supreme Court of the United States

October Term, 1954.

F. O. WILEMON, ET AL., *Petitioners,*

v.

CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, ET AL., *Respondents*

REPLY OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE EARL WARREN,
Chief Justice of the United States, and
the Associate Justices of the
Supreme Court of the United States:

Respondents respectfully show to the Court the following:

I.

OBJECTIONS TO JURISDICTION

Petitioners predicate their grounds of jurisdiction on Amendments 5, 7, and 14 of the Constitution of the United States.

Respondents submit that there is no real and substantial Federal question involved in this case, nor does the same involve an infringement of the Federal Constitution. Petitioners' contention is so wanting in foundation, so abstract and conjectural as to be devoid of all merit and is frivolous.

The sole question in this case is the right of Respondents to the use and possession of the old channel of the Trinity River in Dallas County, Texas, set aside under the laws of the State of Texas for storage, drainage, and conduit purposes under the Plan of Reclamation, and upon which Petitioners as adjoining property owners had encroached, and to which land in controversy Petitioners never had any title or right, the same being the bed of a navigable stream and therefore public land.

Thus no Federal question, constitutional or statutory, is involved and the decision of the State Courts as to the local law is not reviewable in this Honorable Court. *North Shore Boom & Driving Co. v. Nicomen Boom Co.*, 212 U. S. 406, 53 L. Ed. 392, 29 S. Ct. 355.

II.

RESPONDENTS' STATEMENT AND ARGUMENT

Respondents are bodies politic and corporate, created for the purpose of constructing and maintaining levees and other improvements in order to reclaim land subject to periodic flood conditions of the Trinity River in Dallas County, Texas, in accordance with Chapter 6, Title 128, Revised Civil Statutes of the State of Texas, 1925, as authorized and contemplated by Section 59, Article XVI, of the Constitution of the State of Texas.

Under the provisions of the above Statutes, the Commissioners of Appraisement of the City and County of Dallas Levee Improvement District caused a survey to be made of the old channel of the Trinity River in 1926, and the boundaries thereof were fixed and set forth in the Report of the Commissioners of Appraisement filed for record in 1928 with the County Clerk of Dallas County, Texas. The old channel thus surveyed was set aside under a Plan of Reclamation, which provided, among other things, for a change in the course of the channel of the Trinity River as the same existed at that time (1926) and the straightening thereof along the new channel constructed between the levees. The plan provided for the old channel of the Trinity River to be used for the storage of run-off waters behind the levees, allowing this water to pass out through sluice gates and conduits at such times as the elevation of the water in the River would permit, and by

pumping the flood waters so stored from the old channel into the area between the levees when the River was at flood stage. The survey of 1926 fixed meander points, the same being carefully located and monumented by the establishment of iron pipes.

The Trinity River in Dallas County, Texas, is a navigable stream in fact and in law. Articles 5302, 7467, 7467a, 7467b, and 4026, Revised Civil Statutes of the State of Texas, 1925: *Ray v. State of Texas*, 153 S.W. (2) 660, error refused, W.O.M.; *Cox, et al. v. City and County of Dallas Levee Improvement District*, 258 S.W. (2) 851, error refused, N.R.E. Further, it is well settled that the State of Texas owns the beds and waters of all navigable streams. *Diversion Lake Club v. Heath, et al.*, 126 Tex. 129, 86 S. W. (2) 441; *State of Texas v. Bradford*, 121 Tex. 515, 50 S.W. (2) 1065.

Under the Statutes of Texas above referred to, Respondents Districts were permitted by the State of Texas the use and possession of the bed of the stream for the purpose set forth in the Plan of Reclamation. Also, see the *Ray* and *Cox* cases, supra, as well as the decision and holding of the Court of Civil Appeals in this case.

A resurvey of the survey of 1926 was undertaken by Respondents in 1952, and it was found from such resurvey that the Petitioners, the owners of a tract of land adjoining a portion of the meanders of the Trinity River, had encroached in the old channel by placing dirt, fill, asphalt,

improvements and buildings thereon to the approximate extent of one acre. Hence, as plaintiffs in the Trial Court, Respondents brought suit to recover the use and possession of the land in the channel upon which Petitioners had encroached and also for mandatory injunction requiring the removal of such encroachments and for prohibitory injunction enjoining further encroachments therein.

The Trial Court and the Court of Civil Appeals (Wilemon et al v. City and County of Dallas Levee Improvement District, 264 S.W. (2) 543) correctly found that there was no substantial controversy that the land involved in this suit was not public land lying within the old channel of the Trinity River set aside for drainage, storage and conduit purposes under the Statutes of the State of Texas, and that there was no genuine issue of fact as to the boundary line between such channel and the contiguous Wilemon (Petitioners) property. The Supreme Court of Texas correctly refused a writ of error.

Petitioners conceded in their testimony that the survey of 1926 was accurate, but it was argued that such survey was not a survey of the high or cut-back of the Trinity River in that there were trees in the river bed which could not live for a long period of time under water (Statement of Facts, pages 52, 69, 109 and 110). Petitioners' witness further testified that the land had not accreted from natural causes since the survey of 1926 (Statement of Facts, page 62). Petitioners' witness further agreed with the

resurvey of the old channel of 1952 (Statement of Facts, pages 86, 87, 109 and 110). Petitioners recognized and acquiesced in the meander line and further recognized and acquiesced in the fact that the property in question was owned by the State of Texas in that they made an application to the Land Commissioner of this State for title to the land, under and by virtue of Article 7467b, Revised Civil Statutes of the State of Texas, 1925 (Statement of Facts, pages 124-127).

Further, Petitioners nor their predecessors in title ever complained of or appealed from the Report of the Commissioners of Appraisement which described the meander of the channel of the Trinity River and established the same for storage, drainage and conduit purposes under the Plan of Reclamation. Petitioners cannot now be heard to attack that Report or the findings therein. *Dallas County Bois D'Arc Island District v. Glenn* (Commission of Appeals of Texas), 288 S.W. 165; *Burgess v. City and County of Dallas Levee Improvement District* (Dallas Court of Civil Appeals), 155 S.W. (2) 402.

It is undisputed that there was no deed or other conveyance out of the State of Texas to Petitioners or their predecessors in title.

Petitioner, F. O. Wilemon, testified:

> "Q. Did you ever obtain from the State of Texas a patent, deed of conveyance, quitclaim deed, or other instrument granting to you the portion of

land designated in pink on the map attached to the pleadings?

"A. No." (Statement of Facts, page 116).

Again:

"Q. So the State of Texas has never relinquished, quitclaimed, or granted to you, F. O. Wilemon, or to your brother, A. E. Wilemon, any part of this land in controversy here?

"A. No." (Statement of Facts, page 116).

Again:

"Q. Are you claiming any part of the land in controversy here?

"A. I couldn't claim it if I didn't have title to it." (Statement of Facts, page 116-117).

The opinion of the Court of Civil Appeals in this case quoted at some length from the *Cox* case, supra, involving the same channel and having substantially the same facts and held as a matter of law the bed and channel of the old Trinity River, unless conveyed or abandoned, remains the property of the State of Texas. *Ray v. State* (Court of Civil Appeals), 153 S.W. (2) 660, W.R.W.M.

CONCLUSION

In conclusion, it is respectfully submitted that the issues of fact and the law as raised by the pleadings and the evidence were properly decided and disposed of by the Court of Civil Appeals, and that the Supreme Court of Texas correctly refused Petitioners' application for writ of error;

that Petitioners were not deprived of their property without due process of law, in that they never owned and could not have owned the bed of a navigable stream; that their adjoining property was and is not in dispute, and, of course, it follows that no property of Petitioners has been "taken without just compensation." Further, since there was no genuine issue of fact and no material facts which were actually and in good faith controverted, the Trial Court properly sustained the motion for summary judgment under the plain provision of Rule 166-A, Texas Rules of Civil Procedure, and, further, the Trial Court was correct in withdrawing the case from the jury and rendering judgment for Respondents as prayed, determining that as a matter of law the land in controversy constituted the old channel of the Trinity River and was owned by the State of Texas subject to the right and use of Respondents, all of which action was affirmed by the Court of Civil Appeals in the reported decision, supra.

WHEREFORE, Respondents pray that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents.

NORMAN R. CROZIER, JR.,
of Counsel.

APPENDIX

The relevant provisions of the Constitution and Statutes of the State of Texas are as follows:

Constitution of Texas

Article XVI, Section 59 (a). The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its over-flowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

Constitution of Texas

Article XVI, Section 59(b). There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts *shall be governmental agencies and bodies politic* and corporate with such powers of government and with the authority to exercise such rights, privi-

leges and functions concerning the subject matter of this amendment as may be conferred by law.

RCS

Article 7972. Levee Improvement Districts. There may be created within this State conservation and reclamation districts to be known as Levee Improvement Districts, for the purpose of constructing and maintaining levees and other improvements on, along and contiguous to rivers, creeks, and streams, for the purpose of reclaiming lands from overflow from such streams, for the purpose of the control and distribution of the waters of rivers and streams by straightening and otherwise improving the same, and for the proper drainage and other improvement of such lands, all as contemplated by Section 59, Article 16, of the Constitution of this State, for the conservation and development of the natural resources of this State, which said districts shall have and may exercise all the rights, powers and privileges given by this Act and in accordance with its limitations and provisions.

RCS

Article 7980. Levee Improvement District Entitled to Benefits. Levee improvement districts created under this Act shall have full power and authority to build, construct, complete, carry out, maintain, protect, and in case of necessity, add to and rebuild all works and improvements within their district necessary or proper to fully accomplish any plan of reclamation lawfully adopted for or on behalf of such district, and may make all necessary and proper contracts, and employ all persons and means necessary or proper to that end.

RCS

Article 7986. Authority to Act. Levee improvement districts shall have authority to act jointly with each other, with cities and towns and other political subdivisions of the state, with other states, and with the Government of the United States in the performance of any of the things permitted by this Act, such joint acts to be done upon such terms as may be agreed upon by their supervisors, subject to the approval of the State Reclamation Engineer.

RCS

Article 5302. Surveys on Navigable Streams. All lands surveyed for individuals, lying on navigable water courses, shall front one-half of the square on the water course and the line running at right angles with the general course of the stream, if circumstances of the lines previously surveyed under the laws will permit. All streams so far as they retain an average width of thirty feet from the mouth up shall be considered navigable streams within the meaning hereof, and they shall not be crossed by the lines of any survey. All surveys not made upon navigable water courses shall be in a square, so far as lines previously surveyed will permit. (Acts 1837, p. 63; P.D. 4529, G.L. vol. 1, p. 1405.)

RCS

Article 7467. Property of the State. The waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed,

within the State of Texas, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter. When an application is made for appropriation of such water for mining purposes, the owner of the land through which the water flows and which is to be appropriated shall have the prior right to appropriate same, and shall be permitted to exercise such right, although such owner may not have made application prior to such application by another, and such owner shall have only ten days after notice of application to appropriate such water in which to exercise his prior right to appropriate, which he shall do by written application filed with the Board of Water Engineers within such time. (Acts 1921, p. 233, sec. 2.)

RCS

Article 7467(a). River Beds and Channels in Cities and Towns. The State of Texas hereby relinquishes, quit claims and grants unto all incorporated cities and towns that have a population of forty thousand inhabitants, or more, according to the 1920 census, all of the beds and channels, and also all of the abandoned beds and channels, of all rivers, streams and other channels that are now or that may hereafter be within the present or future corporate limits of such cities or towns, in so far as the beds and channels, and such abandoned channels, of such rivers, streams and other channels may be owned or claimed as the property of said State. (Acts 1925, 39th Leg., ch. 155, p. 366, sec. 1.)

RCS

Article 7467(b) Abandoned channels in counties of 250,000 population.

Section 1. *Relinquishment of title and interest of state.* In all counties of this State having a population in excess of three hundred and fifty thousand (350,000) according to the last preceding Federal Census, the State of Texas hereby relinquishes, quit claims and grants unto the adjacent landowners all right, title and interest of the State of Texas in and to all of the beds and channels of all rivers and streams that are now, or that may hereafter be, abandoned by reason of the construction of new beds or channels for such rivers or streams by levee improvement districts, drainage districts, or flood control districts organized and created under the laws of the State of Texas or by special Act of the Legislature of the State of Texas, where such abandonment is provided under an approved plan of reclamation.

Section 2 *Title of adjacent owners.* The land owners adjacent to such abandoned bed or channel, shall own that portion of such bed or channel adjacent to their respective lands, and to the middle of such abandoned bed or channel.

Section 2a. *Perfection of title.* Any claimant to any portion of said land may perfect his title by applying to the Commissioner of the General Land Office to purchase the land claimed. Such application shall be accompanied by field notes of the tract claimed together with filing fee of One Dollar ($1) and evidence of such claimant's right and title. Upon receipt of a satisfactory application and satis-

factory showing of right, such application shall be approved and the land awarded to the applicant. Within sixty (60) days after such award, the applicant shall pay to the Commissioner of the General Land Office for the use and benefit of the public school fund the sum of Ten Dollars ($10) per acre for the land, and upon receipt thereof, the Commissioner shall issue to the claimant a patent to the land. The Commissioner is hereby authorized to make such rules and regulations as may be appropriate and necessary to accomplish the purpose of this Act.

Section 3. *Evidence of abandonment.* Whenever a bed or channel of a river or stream has been filled under an approved plan of reclamation as provided by law, or where an approved plan of reclamation provides for the filling of a bed or channel of a river or stream, such fact shall be conclusive evidence of the abandonment of such bed or channel. *Wherever an approved plan of reclamation provides that a bed or channel of a river or stream shall be used for the transmission or storage of storm waters, such fact shall be conclusive evidence that such bed or channel has not been abandoned.* (Italics added)

Section 4. *Rights of State, political subdivisions and public utilities.* Nothing herein contained shall be construed as affecting in any manner the rights of the State, cities, counties, any other political subdivision of the State, public utility companies, or of the public, in and to the streets, alleys, roads, parks, levees, flood control works, water lines, sewer lines, gas lines, oil lines, power lines, railroads, or other public utility lines, where the same now occupy or cross any abandoned river bed or channel, provided further, that nothing herein shall be construed as

affecting in any manner the validity of oil, gas and other mineral leases, heretofore executed, or that may be hereafter executed by the State prior to the abandonment of such bed or channel.

Section 5. *Approved plan of reclamation defined.* Wherever the term "approved plan of reclamation" is used herein, it shall be construed to mean a plan of reclamation approved by such authority or authorities as are in such cases provided by the laws of the State of Texas.

Section 5a. *Reservation of minerals.* All minerals in any land donated under the provisions of this Act are hereby reserved to the State of Texas.

Section 6. *City of San Antonio excepted.* The provision of this Act shall not apply to that portion of the river bed situated within the corporate limits of San Antonio, Texas. Acts 1949, 51st Leg., p. 708, ch. 372.

RCS

Article 4026. Property of State. All fish and other aquatic animal life contained in the fresh water rivers, creeks and streams and in lakes or sloughs subject to overflow from rivers or other streams within the borders of this State are hereby declared to be the property of the people of this State. All of the public rivers, bayous, lagoons, creeks, lakes, bays and inlets in this State, and all that part of the Gulf of Mexico within the jurisdiction of this State, together with their beds and bottoms, and all of the products thereof, shall continue and remain the property of the State of Texas, except in so far as the State shall permit, the use of said waters and bottoms, or permit the taking of the products of such

bottoms and waters, and in so far as this use shall relate to or affect the taking and conservation of fish, oysters, shrimp, crabs, clams, turtle, terrapin, mussels, lobsters, and all other kinds and forms of marine life, or relate to sand, gravel, marl, mud shell and all other kinds of shell, the Game, Fish and Oyster Commissioner shall have jurisdiction over and control of, in accordance with and by the authority vested in him by the laws of this State. (Acts 1925, p. 438, 39th Leg., ch. 178, sec. 1, art. 7.)

RCS

Article 7991. Commissioners of appraisement.

When the petition for the creation of a levee improvement district stipulates that taxes are to be levied upon a benefit basis, then as soon after the approval and adoption of the plan of reclamation as practicable, the commissioners' court of the county of jurisdiction shall appoint three disinterested commissioners, who shall be known as "commissioners of appraisement," . . . and such commissioners of appraisement shall proceed as follows:

RCS

Article 7995. Filing exceptions and damage claims. . . . The findings of the commissioners as to benefits shall be final and conclusive and shall be entered of record in the minutes of the board of supervisors and certified copies thereof shall be filed with the county clerk of each county in which any portion of the lands within such district are located, as a permanent record of such county, and such filing shall be notice to all persons of the contents of such decree. . . . No person owning or having any

interest in any land in any county in which copy of the plan of reclamation has been filed and notice published of the hearing before the commissioners of appraisement, who has failed to file claim for damages as above provided, or who has failed to file objection to the damages assessed by the commissioners against his land, or who having filed such claim or objection, shall thereafter be heard to claim any damages from the levee district or its supervisors, officers or agents by reason of the carrying out of the plan of reclamation.

FILED
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HAROLD B. WILLEY, Cle

No. 208

In the

Supreme Court of the United States

F. O. WILEMON, *et al.*,

Petitioners,

v.

CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, *et al.*,

Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI ON BEHALF OF F. O. WILEMON AND A. E. WILEMON

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Petitioners,

v.

CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT, *et al.*,

Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI ON BEHALF OF F. O. WILEMON AND A. E. WILEMON, TO REVIEW A JUDGMENT OF THE COURT OF CIVIL APPEALS IN THE 8TH SUPREME JUDICIAL DISTRICT OF TEXAS, AND DENIAL OF WRIT OF ERROR BY SUPREME COURT OF TEXAS, AND ORDER OVERRULING MOTION FOR REHEARING.

To the Supreme Court of the United States:

I.

GROUNDS UPON WHICH PETITIONERS BASE THEIR PETITION FOR REHEARING

Time for Filing

The time for filing this Motion under Supreme Court Rule #58 was fixed by a stay order of the Court of Civil

Appeals at El Paso dated October 27, 1954, upon motion duly made by petitioners by which order execution was stayed to November 4, 1954.

JURISDICTION

Petitioners rely upon the grounds showing jurisdiction of the Supreme Court as set out in their petition for Writ of Certiorari heretofore filed.

STATEMENT OF ADDITIONAL ASPECTS OF THE CASE

In the various steps of this case there are obvious errors which show clearly that petitioners have not been accorded their rights under the due-process-of-law provisions of the Constitution of the United States heretofore recited.

First. Respondents (called plaintiffs herein for consistency) have not proved in any wise in the case that the land in dispute was, or is being, taken in accordance with the laws of Texas. Article 7880-126 (Acts 1925, 39th Legislature) of the Revised Statutes of Texas, provides for taking of land by Water Control and Improvement Districts reciting that they may "proceed for condemnation under * * * Title 52, Eminent Domain, of the Revised Civil Statutes of Texas, Code of the Year 1925," Section (m) of the same reciting "It is specifically provided that nothing in this section shall empower a District to condemn any land * * * held by another person * * * save and except * * * to serve a public need superior to * * * the use to which any such property may have been devoted." Section (n) reciting

"Any County, Levee District * * * may elect to proceed to condemnation under the provisions of * * * this act, having regard only to causing such proceedings to conform to the law of the being of any such governmental agency."

Petitioners urge that plaintiffs did not proceed under the Condemnation Statutes (Title 52) at any time and are not so proceeding in this case. Title 52 of said Statutes, dealing with Eminent Domain, sets out, step by step, how plaintiffs shall proceed to condemn; they have not begun such proceedings as yet. Their whole case is a reliance on alleged acquiescence of defendants (petitioners herein), but have not come forth with any proof of acquiescence.

Second. The Courts, in this case, have utterly disregarded defendants' able contention for, and claim for, compensation, and have erroneously held that defendants shall have no compensation, as the Condemnation Statutes provide, for either the land or the valuable improvements which defendants placed upon the land in sight of, and with the knowledge and apparent acquiescence of, the plaintiffs, to-wit, a building costing approximately $37,000.00.

Third. Plaintiffs' whole claim seems to be based upon the fact that a map drawn upon a piece of paper in 1926 showed a line that they claim is the true line of the river bank. They have failed to show, however, that such map was at any time called to the attention of defendants or their ancestors in title either expressly or constructively. Section (K) of the above-quoted Article 7880-126 provides for the type of legal notice that shall go to all property owners that may be affected by proper condemnation proceedings, said

notice containing, among other things, the following: "To the owners of * * * lands or other property * * * lying in * * * take notice that a copy of the adopted plans of improvement by * * * are now open to inspection * * * at the District's office at * * *. The plans, contour maps and specifications will make manifest how your property will be affected." Defendants have never had an opportunity to defend any legal proceedings aimed at taking the land in question which defendants can show lies between the true river bank and the line fixed on paper by the map. Plaintiffs have failed wholly to correlate that map line with any metes and bounds description or markers in place upon the lands.

WHEREFORE, defendants pray that this Honorable Court rehear and reconsider defendants' petition for Writ of Certiorari in this cause, together with all relief for which defendants have heretofore prayed.

Respectfully submitted,

M. M. WADE,

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Dallas, Texas,
Attorneys for Petitioners.

Of Counsel:
O. M. STUBBLEFIELD and
HERBERT S. BONNEY, JR.

I, M. M. WADE, attorney for petitioners, certify that this petition for rehearing is presented in good faith, and not for delay, and further that the petition contains substantial grounds and citations of pertinent law not previously presented.

M. M. WADE,
Attorney for Petitioners